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Supreme Court, U.S.
FILED
AUG 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-147

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RECEIVED
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SUPREME COURT, U.S.

RICHARD DUGGER,

Cross-petitioner,

vs.

ROBERT BRIAN WATERHOUSE,

Cross-respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Cross-respondent, ROBERT BRIAN WATERHOUSE,, who is now held on death row at the Florida State Prison in Starke, Florida, asks leave to file the accompanying Brief in Opposition to the State's Cross-Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

Mr. Waterhouse's affidavit in support of this motion is attached hereto. He was granted leave to proceed in forma pauperis in the courts below, as well as in the state courts of Mississippi prior to bringing this post-conviction action.

Respectfully submitted,

STEPHEN B. BRIGHT
185 Walton Street, N.W.
Atlanta, GA 30303
(404) 688-1202

Counsel for Mr. Waterhouse

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

No. 87-7328

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, ROBERT BRIAN WATERHOUSE, being duly sworn, hereby depose and state that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions herein relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed. I am confined on death row at the Florida State Prison, at Starke, Florida.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes _____ No ✓

b. Pensions, annuities or life insurance payments?

Yes _____ No ✓

c. Rent payments, interest or dividends?

Yes _____ No ✓

d. Gifts or inheritances?

Yes _____ No ✓

e. Any other sources?

Yes ✓ No _____

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: Inmates does not have receipts. Exact amount not known.

3. Do you own any cash, or do you have money in a checking or savings account? Yes ✓ No ____ (Include any funds in prison accounts) If the answer is yes, state the total value of the items owned: [redacted] $52.55.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓ If the answer is yes, describe the property and state its approximate value:

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: None.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated June 23, 1988.

Robert Brian Waterhouse
ROBERT BRIAN WATERHOUSE

Subscribed and sworn to before me this 23 day of June, 1988.

L. A. Saunders
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Mar. 24, 1991

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $52.55 on account to his credit at the Florida State Prison where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of this institution: NONE

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JUN 22 1988
INMATE BANK TRUST FUND
FLORIDA STATE PRISON

Authorized Officer

No. 88-147

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

RICHARD L. DUGGER,

Cross-Petitioner,

vs.

ROBERT BRIAN WATERHOUSE,

Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

STEPHEN B. BRIGHT*
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Attorneys for Mr. Waterhouse

* Counsel of Record

QUESTION PRESENTED

Whether this Court should grant certiorari to consider whether jury instructions which unconstitutionally limited the jury's consideration of mitigating circumstances at a capital trail were harmless when the Florida Supreme Court declined to address the issue because of the failure of the cross-petitioner to present the issue in his brief to that Court?

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STATEMENT OF THE CASE

Mr. Waterhouse was convicted of murder and sentenced to death in Pinellas County, Florida, in September, 1980. At the sentencing phase of the trial, the court instructed the jury that it was to consider as mitigating factors only those set out in Fla. Stat. 921.141 (6). Record on Appeal 2296. The prosecutor emphasized in his closing argument that mitigating factors were limited to the statutory list. With regard to evidence which had been presented about Mr. Waterhouse's alcohol problems, the prosecutor argued: "Is that a mitigating factor? I didn't see anything about alcohol [on the statutory list]."

On petition for habeas corpus relief in the Florida Supreme Court, Mr. Waterhouse argued that he was entitled to relief under this Court's decision in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987), because "it could not be clearer that the advisory jury was instructed to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and that the proceedings, therefore, did not comport with Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978)." Hitchcock, 95 L.Ed.2d at 353. The State, representing the respondent warden, argued that there was no Hitchcock violation.

The Florida Supreme Court held that the sentencing proceedings violated Hitchcock:

> This case represents another situation where the trial judge did not instruct on, and the jury clearly did not consider, evidence of nonstatutory mitigating circumstances. Here, the jury had the added restriction of the prosecuting attorney telling the jury during closing argument that (consistent with the judge's instructions) the jury should not consider the proffered nonstatutory mitigating evidence because it was not on the statutory "list."

Waterhouse v. State, 522 So.2d 341, 344 (1988); Appendix to the

Cross-Petition for Certiorari at A-11. The Florida Supreme Court also found that the unconstitutional instructions prevented the jury from considering important mitigating evidence:

> . . . Here, as in prior cases, it is abundantly clear that the jury was not permitted to consider proffered evidence of relevant, nonstatutory mitigating circumstances. At the sentencing proceeding, Waterhouse proffered evidence that he suffered from alcoholism and was under the influence on the night of the murder. He also presented evidence that despite the difficulties of being a severely abused child, he was a well behaved child until he suffered a severe head injury allegedly resulting in organic brain damage. The jurors should have been allowed to consider these factors in mitigation, but they were told by both the judge and the prosecutor that it could not. For these reasons a reweighing of the aggravating and mitigating factors is required.

522 So.2d at 344; Appendix at A-12-A-13. The Court also observed that the State had failed to argue that that error was harmless:

> Because the state declined to argue that the error complained of was harmless, we will not pass on that issue.

522 So.2d at 344 n. *; Appendix at A-13 n. *. The State argued harmless error for the first time in its petition for rehearing, which was denied on April 25, 1988.

REASONS FOR DENYING THE WRIT

I. THE HARMLESS ERROR ISSUE WAS NOT PROPERLY PRESENTED TO THE COURT BELOW AND IS NOT WORTHY OF PLENARY REVIEW BY THIS COURT

This Court should deny the cross-petition for certiorari because the State has failed to show "that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgement on certiorari." Supreme Court Rule 21.1(h). The State did not and cannot comply with this Rule because the harmless error assertion it seeks to present here was not raised prior to the decision of the Florida Supreme Court and that Court relied upon the State's procedural default in refusing to address the issue:

> Because the state declined to argue that the error complained of was harmless, we will not pass on that issue.

522 So.2d at 344 n. *; Appendix at A-13 n. *. It is well established that where a state court declines to address an issue in reliance on its own procedural default rules, a federal court will not decide the constitutional issue. Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986).

The Florida Supreme Court did not "misconstrue" this Court's decision in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987), as asserted by the State. Instead, it did exactly the same thing this Court did in Hitchcock:

> Respondent [Dugger] has made no attempt to argue that this error was harmless, or that it had not effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock v. Dugger, 95 L.Ed.2d at 353. The Florida Supreme Court is well aware of the applicability of the harmless error standard to Hitchcock violations as demonstrated by its finding of harmless error in other cases involving Hitchcock errors. See, e.g., Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987).

In addition, the harmless error issue belatedly asserted by the State does not present an important issue worthy of consideration by this Court by way of certiorari. The issue presents none of the considerations governing review by certiorari set out in Supreme Court Rule 17. As previously shown, the Florida Supreme Court has correctly applied the harmless error standard in other cases and there is no suggestion that other state or federal courts are in need of guidance from this Court on this issue. Moreover, this case would not be an appropriate one in which to address the issue of harmlessness since the Florida Supreme Court has already found that in this case it "abundantly clear that the jury was not permitted to consider proffered evidence of relevant, non-statutory mitigating circumstances." 522 So.2d at 344, Appendix to Cross-Petition at A-12. Finally, the question of whether a constitutional violation is harmless is "a question more appropriately left to the courts below." Connecticut v. Johnson, 460 U.S. 73, 102 (1983) (Powell, J., dissenting).

Accordingly, the cross-petition for certiorari should be denied.

CONCLUSION

For the reasons previously stated, this Court should deny the cross-petition for certiorari.

Respectfully Submitted,

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Attorneys for Mr. Waterhouse

* Counsel of record

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served by mail upon Assistant State Attorney General Peggy Quince, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 24th day of August, 1988.